

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 18-14245-CV-MIDDLEBROOKS/White

RICHARD EUGENE FYE, III,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

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**ORDER ADOPTING REPORT AND RECOMMENDATION**

THIS CAUSE comes before the Court on Magistrate Judge Patrick A. White's Report and Recommendation (DE 20) ("Report"), recommending granting Movant Richard Eugene Fye, III's motion to vacate, filed pursuant to 28 U.S.C. §2255. Fye's §2255 motion alleges that his trial counsel was ineffective for failing to file a requested appeal and failing to file a pre-trial motion to dismiss. (DE 8). The government responded to the motion, conceding that relief should be granted as to the claim for failure to file a direct appeal. (DE 17).

Judge White's Report recommends the Motion be granted in part, that the prior criminal judgment be vacated, that the same sentence be re-imposed, and that Fye be permitted to file a direct appeal, as directed by the procedures set forth in *United States v. Phillips*, 225 F. 3d 1198, 1200 (11<sup>th</sup> Cir. 2000). Judge White further recommends that Fye's remaining claim be dismissed without prejudice to file a §2255 motion once his conviction and sentence become final after resolution of his direct appeal.

The Report was issued on November 7, 2018. Neither party has filed objections to the Report and the time period within which to do so has now expired. When no party has timely or properly objected, "the court need only satisfy itself that there is no clear error on the face of the

record in order to accept the recommendation.” Fed. R. Civ. P. 72 advisory committee’s note to 1983 addition (citation omitted).

Upon review of the Report and the record as a whole, I agree with Magistrate Judge White’s conclusions. Accordingly, it is **ORDERED AND ADJUDGED** that:

- (1) Magistrate Judge White’s Report and Recommendation (DE 20) is hereby **ADOPTED**.
- (2) Fye’s Motion to Vacate under 28 U.S.C. §2255 (DE 1), as amended, is **GRANTED IN PART**, solely with respect to his claim that counsel was ineffective for failing to prosecute a requested direct appeal.
- (3) Fye’s sentence will be vacated and re-imposed by separate order.
- (4) Fye is permitted to file a direct appeal of his conviction and sentence.
- (5) Fye’s remaining claims are **DISMISSED** without prejudice for Fye to file a Section 2255 motion once his conviction and sentence become final after resolution of his direct appeal.
- (6) All further Orders and pleadings pertaining to re-sentencing and appeal shall be filed on the criminal docket, Case No. 17-14014-CR-DMM.
- (7) The Clerk of the Court is directed to **CLOSE THIS CASE**.
- (8) All pending motions are **DENIED AS MOOT**.

**DONE AND ORDERED** in Chambers in West Palm Beach, Florida, this 30th day of November, 2018.



Donald M. Middlebrooks  
United States District Judge

Copies to: Counsel of Record